NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

2d Civil No. 62286

Ventura County Superior Ct.
No. 65291)

COURT OF APPEAL-SECOND DIST.
FILED
JUN2-1982
CLAY ROBBINS,JR. Clerk
Deputy Clerk

RAYMOND FERREN,

Plaintiff and Appellant,

v.

CHRISTEN BRUN HENRICHSEN,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of Ventura County. Steven J. Stone, Judge. Affirmed.

John Brown for Plaintiff and Appellant.
Ritner and Wong and William B. Ritner for Defendant and Respondent.

Plaintiff Raymond Ferren (Raymond) appeals from a summary judgment for defendant in an action alleging breach of contract, legal malpractice and fraud in the rendering of legal services in a prior marriage dissolution proceeding.

Raymond was served with a petition and order to show cause on June 15, 1972, in the said marriage dissolution action entitled **In re the Marriage of Petitioner: Glena Ferren and Respondent: Raymond W. Ferren,** Ventura County Superior Court, no. D64058. He retained defendant Henrichsen (Henrichsen) on June 16, 1972, pursuant to an oral agreement. Defendant prepared and filed a response to the petition asking that the marriage be declared a nullity, that spousal support not be awarded, and seeking custody of the children and award of attorney's fees to Raymond.

Points and authorities filed in support of Raymond's response alleged that Glena's prior marriage was purportedly dissolved by a Mexican decree of divorce dated November 7, 1955, in which proceedings neither Glena nor her former husband ever personally appeared in Mexico, and that both were domiciled in and residents of the State of California at the time the purported decree was obtained.

In connection with the dissolution and at the hearing on the order to show cause on August 11, 1972, a letter dated April 11, 1956, from the Veterans Administration to Raymond was admitted in evidence reflecting that an educa-

tional allowance for the benefit of Glena was being denied on the ground that her Mexican divorce was invalid. Both parties testified and on submission of the matter the court found the marriage to be valid, and thereafter awarded temporary custody of the children to Glena and temporary child and spousal support to her.

On May 17, 1973, Raymond substituted himself in propria persona in place of Henrichsen. In such status, on March 8, 1974, he entered into a marital and property settlement agreement with Glena which recited they were married on November 19, 1955, and ever since had been husband and wife. He further stipulated the dissolution could be heard as an uncontested matter and that the settlement agreement could be incorporated in the interlocutory judgment. The interlocutory judgment was entered March 12, 1974, and the final judgment entered January 30, 1975.

On February 27, 1975, Raymond filed a motion to quash the service of summons, or in the alternative, for dismissal. The motion was denied and he appealed. This court affirmed the denial and in the process found the marriage valid.[1]

Petitions for rehearing and for a hearing before the California Supreme Court were denied as was a petition for writ of certiorari to the United States Supreme Court on February 22, 1977. (429 U.S. 1098 [51 L.Ed.2d 545].)

Having no place else to go, Raymond filed this action against Henrichsen May 10, 1977. A first amended com-

1. **In re the Marriage of Ferren** (1976) 2d Civil No. 47321.

plaint was filed July 26, 1978, with two causes of action alleging in essence that Henrichsen was guilty of breach of contract and malpractice by failing to file a motion to quash service in the first instance rather than filing a responsive pleading and making a general appearance. The failure was alleged to constitute a waiver of Raymond's right to file such a motion resulting in his inability to contest the validity of the marriage.

A third cause of action alleged fraudulent concealment of the fact that by making a general appearance a waiver resulted of Raymond's right to contest Glena's capacity to sue or to contest the court's jurisdiction over the subject matter.

A second amended answer was filed denying the allegations of all three causes of action and affirmatively alleging the statute of limitations as a defense.

After the matter finally became at issue on the pleadings, Henrichsen filed a motion for summary judgment contending that the legal malpractice was strictly a question of law, that the statute of limitations barred any action for breach of contract and negligence and that a different result would not have been obtained if a motion to quash had been utilized. Supplemental points and authorities filed subsequently contended the action was also barred by collateral estoppel arising from the prior dissolution and the statute of limitations based on lack of a written contract of employment.

Raymond filed a motion for partial summary judgment as to liability issues for malpractice and breach of contract. The trial court denied Raymond's motion and granted Henrichsen's motion for summary judgment, and judgment accordingly was entered November 24, 1980. This appeal ensued.

Raymond first contends that the minute order and the formal order granting summary judgment inadequately specified the grounds or basis for the order. Raymond cites no authority to support his contention other than a recommendation contained in California Continuing Education of the Bar, 2 California Civil Procedure Before Trial 310 (1978), that summary judgments identify the issues found to be without substantial controversy. The recommendation is not controlling.

Code of Civil procedure section 437, subdivision (c) specifies: "Such motion [summary judgment] shall be granted if all papers submitted show that there is **no** triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . ." (Emphasis added.) It follows that by granting the summary judgment the court determined that all issues were found to be without substantial controversy.

Furthermore, the court's refusal to grant Raymond's request for findings was proper. The court is without power to make findings of fact and conclusions of law in a summary judgment proceeding. **(Allis-Chalmers Corp.** v **City of Oxnard** (1981) 126 Cal.App.3d 814, 818 fn. 2.)

Secondly, Raymond contends there was no evidence the statute of limitations barred his complaint and to the contrary, the statute was tolled until July 1975 when he first discovered the negligence of his attorney.[2] Raymond relies on **Neel** v. **Magana, Olney, Levy, Cathcart & Gelfand** (1971) 6 Cal.3d 176, 194, for the principle that a "cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action."

The guidelines for effectively pleading delayed discovery are set forth in **Dujardin** v. **Ventura County Gen. Hosp.** (1973) 69 Cal.App.3d 350, at page 356: "In order to properly raise the issue of belated discovery, the plaintiff must state in his complaint when the discovery was made, the circumstances surrounding the discovery, and facts which show that the failure to make an earlier discovery was reasonable, justifiable and not a result of plaintiff's failure to investigate or to act."

Although the complaint and the declaration of Raymond in support of his opposition to the motion for summary judgment adequately allege the time of discovery and the circumstances surrounding the discovery, we conclude as a matter of law that the facts alleged are insufficient to show that his failure to make an earlier discovery was reasonable, justifiable and not a result of his failure to investigate or to act. The allegations in this res-

2. The applicable statute of limitations for legal malpractice was Code of Civil Procedure §339, subdivision 1, (**Alter v. Michael** (1966) 64 Cal 2d 480, 483), which provides a two year period. § 340.6 did not become effective until 1978.

pect are limited to the excuses that his lack of "formal legal training" prevented him from discovering the malpractice until he retained other counsel in July 1975 and that Henrichsen willfully and fraudulently concealed from him the facts of the malpractice.

The record does not give credence to Raymond's excuses. Raymond testified in his deposition that he began to have doubts as to Henrichsen's competency prior to the original order to show cause in August 1972. Thereafter, in May 1973 he substituted Henrichsen out as his attorney of record. On June 15,1973, he wrote a letter to the Client-Attorney Relationship Committee with the Ventura County Bar Association asserting that Henrichsen had (1) failed to act competently; (2) handled a legal matter without preparation adequate in the circumstances; (3) neglected a legal matter entrusted to him; (4) failed to represent a client zealously within the bounds of the law; (5) failed to seek the lawful objectives of his client through reasonable available means permitted by law; (6) concealed or knowingly failed to disclose that which he is required by law to reveal; (7) knowingly engaged in other legal conduct or conduct contrary to a disciplinary rule; and (8) received information clearly establishing a person other than his client has perpetrated a fraud upon a tribunal and did not reveal the fraud to the tribunal.

In response to the Bar Association's request for more detailed information, Raymond replied on June 29, 1973,[3]

3. Raymond's letters of June 15 and 29, 1973, Exhibits M and N to defendant's points and authorities supporting his motion for summary judgment, were authenticated by Raymond at pages 88-89 of his deposition and made exhibits thereto. (Evid. Code §1400, §1401.)

in such particulars as to be obvious that he had been aware for some time of facts suggesting legal malpractice which should have triggered further investigation on his part. (**McGee** v. **Weinberg** (1979) 97 Cal.App.3d 798, 803.) Yet despite his self-professed lack of "formal legal training" he did nothing for over two years or until July 1975 before engaging other legal counsel.

We conclude Raymond did not exercise reasonable diligence to discover timely the alleged malpractice. (**Sanchez** v. **South Hoover Hospital** (1976) 18 Cal.3d 93, 101.) Furthermore, since the fraud cause of action arises from the same basic set of facts as that based on negligence, that cause of action is also barred by the applicable (three year) statute of limitations. (Code Civ. Proc., §338, subd. (4).)

Although our conclusion with respect to the statute of limitations is sufficient to support affirmance of the judgment, one other basis warrants comment. Raymond's basic complaint is that by failing to file a motion to quash, he was deprived of his right to contest the validity of the marriage which in turn was determinative of the jurisdiction of the court and capacity of Glena to sue. However, the same issue was raised on numerous occasions and litigated in the dissolution proceeding.

As noted by this court at page 10 of the slip opinion in **In re the Marriage of Ferren, supra:** "Appellant sought the jurisdiction of the court for the purpose of having his marriage declared a nullity (response to petition for dis-

solution of marriage), and on the order to show cause (August 11, 1972) urged the invalidity of his marriage offering his own testimony in that respect and a letter (April 11, 1956) from the Veteran's Administration, on which issue, after hearing the evidence, the court ruled adversely to him; subsequently he filed notice of appeal therefrom. On numerous occasions on various orders to show cause, motions, points and authorities, etc., he continued to raise the issue."

It is apparent that Raymond was not deprived of his right to contest the validity of the marriage even though trial of the issue was by a general appearance rather than by motion to quash. A choice of procedural strategies is not a proper ground to hold an attorney liable for malpractice. (**Banerian** v. **O'Malley** (1974) 42 Cal.App.3d 604, 613, citing 1 Witkin, Cal. Procedure (2d ed. 1970) § 150, p. 161.) Furthermore, there is no showing that the decision as to the validity of the marriage would have been any different had it been litigated on a motion to quash. To maintain his action for malpractice, Raymond must show the result would have been in his favor had Henrichsen filed the motion to quash. (**Campbell** v. **Magana** (1960) 184 Cal.App.2d 751, 754.)

In view of our conclusion heretofore expressed there is no reason to consider Raymond's other contentions. Henrichsen's contention that Raymond's appeal is frivolous is tempting but rejected.

The judgment is affirmed.
NOT TO BE PUBLISHED.

KLEIN, P.J.

We concur:

LUI, J.

DANIELSON, J.

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PETITION FOR REHEARING DENIED

CLAY ROBBINS, Clerk

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4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

July 25 1982

I have this day filed Order [illegible]

In re: 2nd Civ. No. 62286

Ferren

vs.

Heidrichsen

Respectfully,

Clerk

[illegible]

PROOF OF SERVICE

STATE OF CALIFORNIA)
ss:
COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 4075 Agate, Riverside, California 92509.

On September 27,1982, I served the within Petition For Writ of Certiorari on the interested parties in said action, by placing a true copy in each of three (3) sealed envelopes, with postage thereon fully prepaid, in the United States mail at San Bernardino, California, addressed as follows:

Clerk Court of Appeal	Clerk of Superior Court
2nd Appellate District	County of Ventura
3580 Wilshire Blvd., #301	800 S. Victoria Ave.
Los Angeles, Ca., 90010	Ventura, Ca., 93009

William B. Ritner
A Professional Law Corporation
550 St. Charles Drive, #101
Thousand Oaks, Ca., 91360

I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September 27, 1982, at Riverside, California.

JACK GALLAGHER